LIBRARY
SUPREME COURT, U. S.

FILED
MAR 28 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1271

LEE MANSELL GILSTRAP and MARCUS RANDOLPH MARTIN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT B. THOMPSON
P. O. Box 679
Gainesville, Georgia 30501
Attorney for Petitioners

R. L. MIDDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

INDEX

(a) Reference to Official Report 1

(b) Grounds of Jurisdiction 2

(c) Questions Presented 3

(d) Statutes Involved 4

(e) Statement of the Case 5

Reasons for Granting the Writ 7

Question One Restated—

Does not the federal "Aid of Racketeering Statute", 18 USC 1952, violate federal statutory and constitutional standards in the respects hereinbefore stated? 8

Question Two Restated—

Does the "Official Records Act", 28 USC 1732, permit admission of records in evidence against a third party merely upon proof that they were seized by FBI Agents from a corporation and its agent, without further proof of authenticity, identification or predicate? 11

Conclusion 13

Appendix—

Opinion, United States Court of Appeals, Fifth Circuit A1

Judgment, United States Court of Appeals, Fifth Circuit A10

Petition for Rehearing Denied, United States Court of Appeals, Fifth Circuit A11

Certificate of Service A12

TABLE OF CASES

Bass v. *United States*, (1963) 324 F.2d 168 7

Bisno v. *United States*, 9 Cir., 299 F.2d 711 13
Bruce v. *McClure*, 5 Cir., 220 F.2d 330 13
Carroll v. *United States*, 9 Cir., 326 F.2d 72 13
Hagans v. *Ellerman & Bucknall*, 318 F.2d 583 13
Lenzatta v. *New Jersey*, 306 US 451 9
Missouri Pacific R. R. Co. v. *Austin*, 5 Cir., 292 F.2d 415 13
Niederkrome v. *C. I. R.*, 9 Cir., 266 F.2d 238 13
Palmer v. *Hoffman*, 318 US 109 ..... 7, 11, 12, 13
Smith v. *Bear*, 2 Cir., 237 F.2d 79 12
Standard Oil Co. of Calif. v. *Moore*, 9 Cir., 251 F.2d 188 13
Taylor v. *B. Heller & Co.*, 6 Cir., 364 F.2d 608 13
Teague v. *United States*, 9 Cir., 268 F.2d 925 13
Turf Center, Inc. v. *United States*, (1963) 325 F.2d 793 7
United States v. *Cardiff*, 344 US 174 8
United States v. *Constantine*, 266 US 287 11
United States v. *Fabrizio*, 285 US 263 7
United States v. *Fienberg*, 2 Cir., 144 F.2d 592 13
United States v. *Guest*, 383 US 745 10
United States v. *Reese*, 92 US 214 9
United States v. *Zizzo*, (1964) 338 F.2d 577 7
Winters v. *New York*, 333 US 507 9
Wolcher v. *United States*, 9 Cir., 200 F.2d 493 13

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States—

Article I, Section 8, Clause 3 10
Tenth Amendment 10

Rules of Practice and Procedure of the U. S. Supreme Court—

Rule XI 2
Rule 22 (2) 2

28 USC 1732 ..... 2, 3, 5, 7, 11, 13
18 USC 1953 7
18 USC 1952 ..... 2, 3, 4, 5, 7, 8, 13
18 USC 3772 2
28 USC 1254 (1) 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. .....

LEE MANSELL GILSTRAP and MARCUS RANDOLPH MARTIN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(a)

REFERENCE TO OFFICIAL REPORT

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is reported in ..... F.2d ..... A copy of the official opinion of this case is appended hereto. (R 564).

(b)

GROUNDS OF JURISDICTION

The opinion sought to be reviewed, entitled Lee Mansell Gilstrap and Marcus Randolph Martin v. United States of America, No. 24487, is dated January 31, 1968, petition for rehearing denied March 1, 1968. On March 8, 1968, the Court below entered an Order staying its mandate for a period of 30 days from March 1, 1968, to and including March 31, 1968, pending the filing and ultimate disposition of its petition for writ of certiorari.

The jurisdiction of this Court is invoked under 28 USC 1254 (1), and under and by virtue of Title 18, USC 3772, within the time provided for in Rule XI and Rule 22 (2) of the Rules of Practice and Procedure of the Supreme Court of the United States.

Jurisdiction of this Court is invoked because the United States Court of Appeals for the Fifth Circuit has decided important questions of federal law of gravity and importance in the administration of criminal justice which have not been but should be settled by this Court. That Court had held constitutional, under timely and proper attack, a statute of the United States, 18 USC 1952, which patently offends constitutional standards and has misconstrued and misapplied a decision of this Court respecting the function and predicates of the Official Records Act, 28 USC 1732, and in its ruling has so far departed from the accepted and prescribed course of judicial proceedings so as to require the exercise of this Court's power of supervision.

Additionally, the ruling of the Fifth Circuit in this case, relating to the admissibility of evidence under the Official Records Act, 28 USC 1732(a), is in direct conflict with the ruling of the Sixth Circuit in *NLRB* v. *Sharples Chemicals*, 209 F.2d 645, 653-654, and prior rulings of the Fifth Circuit.

(c)

QUESTIONS PRESENTED

1.

Does not the federal "Aid of Racketeering Statute", 18 USC 1952, violate federal statutory and constitutional standards in the following particulars?

(a) Section 18 USC 1952 is unconstitutionally vague and indefinite, in that it is not sufficiently concise and clear so as to define a criminal offense with adequate clarity to fix a standard or course of conduct which is prohibited thereby, all in violation of the due process provisions of the Fifth Amendment to the Constitution of the United States;

(b) Section 18 USC 1952 is unconstitutional for the reason that its provisions are in excess of the power granted Congress under Article I, Section 8, of the Constitution of the United States;

(c) Section 18 USC 1952 is unconstitutional for the reason that it constitutes an encroachment upon powers reserved by the Tenth Amendment of the Constitution of the United States to the States and is violative of that Amendment; and

(d) Said statute is unconstitutional for the further reason that it infringes upon the right of citizens of the United States in the free exercise and enjoyment of the right to travel freely and to use the instrumentalities of interstate commerce in interstate travel.

2.

Does the "Official Records Act", 28 USC 1732, permit admission of records in evidence against a third party merely upon proof that they were seized by FBI agents

from a corporation and its agent, without further proof of authenticity, identification or predicate?

(d)

STATUTES INVOLVED

18 USC 1952. **Interstate and foreign travel or transportation in aid of racketeering enterprises**

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury. Added Pub.L.

87-228, § 1(a), Sept. 13, 1961, 75 Stat. 498, amended Pub.L. 89-68, July 7, 1965, 79 Stat. 212.

28 USC 1732. **Record made in regular course of business; photographic copies**

(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

(e)

STATEMENT OF THE CASE

The two petitioners, Gilstrap and Martin, were two of four defendants named in a four count indictment, charging a conspiracy to violate and substantive violations of 18 USC 1952. A motion to dismiss the indictment was overruled, followed by a trial which resulted in a verdict of guilty. Sentences were imposed and the judgment was appealed to the United States Court of Appeals for the Fifth Circuit. Upon affirmance there, this petition for writ of certiorari has been timely filed.

The evidence disclosed that Gilstrap had been previously engaged in the gambling business in violation of the laws of the State of Georgia. (R 22-25). In January, 1965, Gilstrap, together with another defendant, caused telephone calls to be placed from a location in Georgia to a Mr. Sullivan in Las Vegas, Nevada, for the purpose of ordering certain gambling equipment. (R 33-36). On later dates, as a part of the transaction, other telephone calls were made to Las Vegas and to St. Louis, Missouri. (R 36-42). The purchase price of the equipment was forwarded from Atlanta to Las Vegas, Nevada, via Western Union money order. (R 44-45). The gambling equipment was shipped via truck freight from Las Vegas to Atlanta, Georgia. (R 7, 142, 148, 155, 160, 165). Thereafter it was transported from Atlanta, Georgia, to Augusta, Georgia, where it was used in a gambling establishment in violation of the laws of the State of Georgia. (R 167).

In April, 1965, FBI Agent Cornett executed two search warrants in Las Vegas, one at the residence of Sullivan and one at the place of business of Christy and Jones, Inc. At the Sullivan residence, he seized Government Exhibit 6 and at Christy and Jones, he seized Government Exhibit 7. Government Exhibit 6 consists of a folder reflecting a transaction alleged to be the order placed for the gambling equipment giving details of the transaction and showing telephone number of Christy and Jones. Government Exhibit 7 is some Roll-O-Dex file cards likewise reflecting this transaction. (R 199-204). Cornett testified that he had no knowledge as to by whom or when the records were made; whether the contents of the records were true or false; he made the determination as to what records he would seize and all he knew about the records, Government Exhibits 6 and 7, was that they were present at the places he searched in Las Vegas and that he seized them. (R 208). These records were admitted over timely

and strenuous objection that they were hearsay and that the evidence did not substantiate the predicates required by the Official Records Act, 28 USC 1732. (R 205, 420). In addition to the use of these records as evidence of the transaction, the records were used for the purpose of establishing the telephone number of Christy and Jones and to prove, by use of the telephone numbers shown thereon, the interrelationship of various telephone calls alleged to have been made among the various alleged conspirators.

REASONS FOR GRANTING THE WRIT

This Court has not heretofore ruled upon the constitutionality of 18 USC 1952, although serious constitutional questions are presented as to the validity of that statute as indicated by Question No. 1 enumerated above. The Fifth Circuit has in this case sustained the validity of the statute, as has the Seventh Circuit in *United States* v. *Zizzo,* (1964) 338 F.2d 577; the Eighth Circuit in *Bass* v. *United States,* (1963) 324 F.2d 168; and the Ninth Circuit in *Turf Center, Inc.* v. *United States,* (1963) 325 F.2d 793. While this Court in *United States* v. *Fabrizio,* 285 US 263, has had occasion to review a companion statute, 18 USC 1953, no issue involving the constitutionality of that statute was before the Court.

With reference to the "Official Records Act", 28 USC 1732, this Court in *Palmer* v. *Hoffman,* 318 US 109, held that business records, in order to be admitted under this statute, must be authenticated and the predicate required by the statute must be established. The Court below held admissible exhibits seized by an FBI agent from corporate and individual records without the requirement that any predicate as to their authenticity or trustworthiness be laid and without any identification of the same, save testimony of the agent that he had seized them at certain places in Las Vegas, Nevada.

QUESTION ONE RESTATED

Does not the federal "Aid of Racketeering Statute", 18 USC 1952, violate federal statutory and constitutional standards in the respects hereinbefore stated?

It is to be observed that under 18 USC 1952, certain conduct is made criminal, dependent upon subsequent events which may or may not be related to the original conduct and need not be related in any way, or pursuant to, such original conduct. The statute in question has neither time, geographical nor definitive conduct limitations.

The offense defined by the statute is completed only after one travels in commerce or utilizes facilities in commerce with the requisite intent and thereafter engages in unlawful activity. *It is not necessary that the subsequent activity be pursuant to the original intent.* Thus, if one travels to Georgia, for instance, intent upon engaging in unlawful prostitution, and thereafter engages in an unlawful gambling enterprise, it would appear that he has violated the statute. On the other hand, if he should travel to Georgia with the intent to engage in unlawful gambling activities and upon failing to make intended connections, returns to his state of origin and thereafter resumes or undertakes any unlawful activity described in the statute, he is subject to the penalties of the statute. This would also be true if he, once arriving in Georgia, went to a third state for unrelated purposes, but while there violated the gambling laws of that state. There are no limitations to such examples.

The vice of vagueness in criminal statutes is the treachery they conceal, either in determining what persons are included or what acts are prohibited. *United States* v. *Cardiff*, 344 US 174. A penal statute must be construed

strictly. Courts cannot introduce words of limitation into a penal statute, so as to make it specific when, as expressed, it is general only. *United States* v. *Reese*, 92 US 214. The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanctions for enforcement. *Winters* v. *New York*, 333 US 507.

In order to be consistent with the constitutional requirement of due process, the terms of a statute enumerating a new penal offense should not forbid the performance of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application, but must be specifically explicit to inform those who are subject to it what conduct on their part will render them subject to its penalties. *Lenzatta* v. *New Jersey*, 306 US 451.

Since the crime sought to be defined by the statute would not be complete until the person affected thereafter committed an unlawful act specified, once he traveled in commerce with the requisite intent, that is with the intent to do any of the specified acts—subparagraphs (1), (2) or (3) as further defined by (b)—, as the statute is drawn, for the remainder of his life he would be subject to prosecution within the period of limitations following his actual performance of the act initially intended or any other act specified by the statute.

At this point we might distinguish those statutes which have been held constitutional which involve interstate travel. In those instances, for example, interstate flight or interstate transportation of vehicles (Dyer Act), or women (Mann Act), the crime is complete once the interstate travel with the prohibited intent is accomplished. This is not true under the present statute, for in order for

the interstate nature of the transaction to become a crime, a subsequent violation of state law is a necessary element. Under the statute, as submitted above, the subsequent act could take place at any time and at any place and could be totally unrelated to the original intent or destination.

For the reasons urged, the statute lacks the specificity necessary to define a criminal offense and to accord due process of law.

In its recent opinion, *United States* v. *Guest*, 383 US 745, this Court held that a citizen of the United States has a basic constitutional right to travel from state to state. The statute under review is an unwarranted limitation upon and restriction of that right. This is especially so in view of the scope of the statute, as urged above. Once a person has become infected with the virus of the statute by traveling in interstate commerce, or by using the facilities of such commerce, he thereafter is restricted in his activities with respect to the acts and conduct specified in subparagraphs (1), (2) and (3), although such subsequent act may be unrelated to the initial travel or communication.

This statute constitutes a perversion of the power of Congress under the Commerce Clause of the Constitution, Article I, Section 8, Clause 3, and is an encroachment upon powers reserved by the Tenth Amendment to the various states. While, by statutory construction and otherwise, the Commerce Clause has been expanded beyond any concept the framers of the Constitution could have anticipated, this statute reached beyond the periphery of further extension. In its broad scope, the statute undertakes to usurp the function of the state to enforce its criminal laws. It assumes powers not delegated, but reserved to the states.

Because a violation occurs only subsequent to the use of interstate facilities, and then only if a state law is subsequently violated, it punishes not for a federal offense, but for a state offense. Because of the diverse laws of the various states, there is no uniformity in its application. This points up the excesses of the statute.

The vice is found, basically, but not limited to, the fact that the travel in or use of interstate facilities, even with the designated unlawful intent, is not a violation. A violation may be effected, retroactively, only when a state statute is subsequently violated. Under the terms of the statute, the interstate nature of the original conduct is in reality only incidental. The intent, substance and effect of the statute is to punish violations of state law. This conclusion is too clear to be disregarded. It is the same conclusion that was reached by the Supreme Court in *United States* v. *Constantine*, 266 US 287.

QUESTION TWO RESTATED

Does the "Official Records Act", 28 USC 1732, permit admission of records in evidence against a third party merely upon proof that they were seized by FBI Agents from a corporation and its agent, without further proof of authenticity, identification or predicate?

We do not find that this Court has had occasion to specifically rule upon questions arising under the Official Records Act except in *Palmer* v. *Hoffman*, (1943) 318 US 109.

In *Hoffman*, this Court carefully reviewed and dealt with this statute, concluding that the admissibility of records under this statute depends upon the requirements thereof being first met, stating that the basis of the rule is the probability of trustworthiness of records "because

they were routine reflections of the day to day operations of a business".

In context, the evidence complained of here consists of records seized from a business enterprise and from an individual on the basis of a search warrant executed by an FBI agent.

Petitioners are total and complete strangers to both the business enterprise and the individual. There is no evidence that records were kept in the regular course of business, that it was the regular course of business to make such records at the time of the occurrence of an act or transaction or that such records were made within a reasonable time after the transaction. Indeed, the records were not identified by any person other than the FBI agent who seized them.

In *Hoffman*, this Court pointed out that the very crux of the preliminary proof for admission under the Official Records Act was establishment that records sought to be introduced were kept in the regular course of business and that they be otherwise properly identified and authenticated as required by the Act. Admissibility of records under this statute depends upon the requirements thereof being first met and the predicates provided therein being properly established.

The ruling of the Court below is in direct conflict and offends the ruling in *Hoffman*. Furthermore, it is without precedent and is inconsistent with all decisional authority.

It has been held that the true test of admissibility of memoranda covered under the business entry rule is the regularity of the business practice of making such a record. *Smith* v. *Bear*, 2 Cir., 237 F.2d 79, 89, citing *Hoffman*.

The decision below constitutes precedent for the admission of evidence totally inconsistent with the following authorities.[1] It constitutes authority for the proposition that a document may be admitted in evidence with no more proof of its authenticity than that it appears to be a business record. In other words, that documents which appear on their face to be business records are "self-identifying", and need not be further identified, despite the ruling of this Court in *Palmer* v. *Hoffman,* supra, and the ruling of substantially all of the United States Courts of Appeal.

CONCLUSION

For the reasons set out above, it is respectfully submitted that this petition for writ of certiorari should be granted and that this Court should determine that the Court below erroneously upheld the constitutionality of 18 USC 1952 under the contentions urged and that it erroneously construed and applied 28 USC 1732(a) in the light of the decision of this Court in *Palmer* v. *Hoffman,* supra, and the existing decisional authorities.

Respectfully submitted,

ROBERT B. THOMPSON

1. *United States* v. *Fienberg,* 2 Cir., 144 F.2d 592, 596; *Wolcher* v. *United States,* 9 Cir., 200 F.2d 493, 498; *Bruce* v. *McClure,* 5 Cir., 220 F.2d 330, 335; *Standard Oil Co. of Calif.* v. *Moore,* 9 Cir., 251 F.2d 188, 212, 216; *Niederkrome* v. *C. I. R.,* 9 Cir., 266 F.2d 238, 241; *Teague* v. *United States,* 9 Cir., 268 F.2d 925; *Missouri Pacific R. R. Co.* v. *Austin,* 5 Cir., 292 F.2d 415, 421; *Bisno* v. *United States,* 9 Cir., 299 F.2d 711; *Hagans* v. *Ellerman & Bucknall,* 3 Cir., 318 F.2d 583; *Carroll* v. *United States,* 9 Cir., 326 F.2d 72, 79; *Taylor* v. *B. Heller & Co.,* 6 Cir., 364 F.2d 608, 613.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24487

LEE MANSELL GILSTRAP and MARCUS RANDOLPH MARTIN,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

(January 31, 1968.)

Before MARIS,* THORNBERRY and AINSWORTH, Circuit Judges.

AINSWORTH, Circuit Judge: Appellants and two other defendants were tried by a jury under a four-count indictment charging them with conspiracy to violate and substantive violations of 18 U.S.C. §§ 2, 371 and 1952. The indictment charged that between January 1 and March 1, 1965, the defendants and a man named Stephen Alexander Price conspired, in violation of 18 U.S.C. § 371,

*Of the Third Circuit, sitting by designation.

to use freight, telephone and telegraph facilities in interstate commerce with the intent to carry on an unlawful gambling enterprise in violation of the laws of Georgia and further in violation of 18 U.S.C. §§ 2 and 1952.

The indictment further charged that Gilstrap used the interstate facilities of Western Union Telegraph Company between Atlanta, Georgia, and Las Vegas, Nevada, to carry on an unlawful business enterprise involving gambling offenses in violation of Georgia law; that Gilstrap and one Coley used the interstate telephone facilities of Southern Bell Telephone and Telegraph Company between Rockdale County, Georgia, and Las Vegas, Nevada, to carry on such unlawful business enterprise; and that Gilstrap and one Mullis used the interstate trucking facilities of certain trucking lines to carry on such illegal purposes between Las Vegas, Nevada, and Atlanta, Georgia.

Prior to the trial appellants moved to dismiss the indictment on the ground that it was too vague in that it alleged an unlawful activity as required by 18 U.S.C. § 1952 but referred to the violation of Georgia law as a violation of the Code of Georgia Annotated, a private publication, and not to the official Code of Georgia of 1933. There is no merit to this contention for Rule 7(c) of Federal Rules of Criminal Procedure requires only that the indictment shall state the official or customary citation of the statute, and that error in the citation shall not be ground for dismissal of the indictment if the error did not mislead the defendants to their prejudice. It is obvious that appellants were in no way prejudiced and the citation to the Code of Georgia Annotated was sufficient.

Appellants further contended that 18 U.S.C. § 1952 is unconstitutionally vague and indefinite and does not sufficiently and concisely define a criminal offense, in violation of the Fifth Amendment to the United States

Constitution; that said section is unconstitutional for the reasons that its provisions exceed the power granted Congress in Article 1, Section 8 of the United States Constitution; that the section is unconstitutional because it constitutes an encroachment upon powers reserved by the Tenth Amendment of the United States Constitution to the States and therefore violates that amendment; and finally, the statute is unconstitutional because it infringes upon the right of citizens to travel freely and use the instrumentalities of interstate commerce in interstate travel. None of these contentions has merit. Appellants concede that the statute has survived other attacks based upon substantially the same grounds. They were doubtless referring to the cases of *United States* v. *Zizzo*, 7 Cir., 1964, 338 F. 2d 577, cert. denied 381 U. S. 915, 85 S. Ct. 1530 (1965); *Turf Center, Inc.* v. *United States*, 9 Cir., 1963, 325 F. 2d 793; *Bass* v. *United States*, 8 Cir., 1963, 324 F. 2d 168, where the statute was adjudged constitutional by the Seventh, Eighth and Ninth Circuits. The power of Congress to regulate commerce has been used before to prohibit the use of interstate facilities to effect an illegal purpose. See, e. g., *United States* v. *Johnson*, 7 Cir., 1945, 149 F. 2d 53, cert. denied, 326 U. S. 722, 66 S. Ct. 28 (1945). The statute does not encroach upon rights of the States reserved by the Tenth Amendment. See *Marshall* v. *United States*, 9 Cir., 1966, 355 F. 2d 999. The district court's ruling which denied appellants' motion to dismiss the indictment was correct.

The jury found Coley guilty on Counts One and Three, Martin guilty on Count One and Gilstrap guilty on all four counts. Defendant Mullis was allowed to enter a plea of nolo contendere and was not tried with the other defendants. Gilstrap and Martin bring this appeal.

At the trial, Stephen Price, the fifth man in the conspiracy, testified as a witness for the Government to show

Gilstrap's prior dealings in the gambling business and to establish a motive on the part of Gilstrap to commit the crimes presently charged against him. Price testified that he had been Gilstrap's partner in a gambling operation at a place called Yarborough Estates, near McDonough, Georgia, and that after this operation terminated, Gilstrap hired him to work as a crap dealer in another gambling place identified as a concrete block building in Rockdale County, Georgia, about one and one-half miles from the Yarborough Estates place. Within two months of its opening, this second operation was raided by the police and Gilstrap's gambling equipment was confiscated. Soon thereafter, during January of 1965, Gilstrap and Coley contacted Price to inquire about the availability of some used gambling equipment. In the presence of Gilstrap and Coley, Price telephoned a Mr. Sullivan with Christy Jones and Company in Las Vegas, Nevada, who informed him that he had such equipment for sale and told him what the cost would be. One of the men, either Gilstrap or Coley, gave Price the money for the equipment and instructed him to order it in Coley's name, and to charge any phone calls he might have to make to Coley's telephone number. Price did as he was instructed and ordered the equipment by telephone. When the equipment was late in arriving, Coley became concerned and persuaded Price to trace and expedite delivery of the equipment. Price made several calls to Las Vegas and to St. Louis, Missouri, again charging them to Coley's phone number, and eventually located the equipment in Atlanta, Georgia.

Not long after these transactions were completed, Gilstrap hired Price to work at a gambling establishment in Augusta, Georgia, called the Paramount Club, where defendants Coley and Martin also were employed.

The defendants concede that the testimony of the other witnesses and the documentary evidence established that the gambling equipment was shipped via truck freight from Las Vegas to Atlanta, that Coley made inquiry concerning the shipment, and that when it arrived in Atlanta, Mullis picked it up, using the name Coley. The defendants also concede that the evidence established that a Western Union money order in the amount of $1,895.84 was sent from Atlanta to Christy Jones and Company in Las Vegas, Nevada, and that the jury could have reasonably inferred that this was the money order Price testified he sent to cover the cost of the equipment. The defendants further concede that the evidence disclosed that between January 1 and March 1, 1965, a number of long-distance telephone calls were made from, to and among the defendants, including such locations as Gilstrap's home, Martin's home, the house Martin rented in Augusta, Coley's residence, Mullis' residence, and several pay stations located in the vicinity of the Paramount Club in Augusta, Georgia; and that the record will support a finding by the jury that such calls were made.

Appellants contend that the court erred in admitting evidence of Gilstrap's prior criminal activity on the ground that the events were remote in time to the offenses charged in the indictment; that they had no relevancy to the issue on trial; that they formed no issue to be tried; and that the only purpose would be to prejudice the jury against Gilstrap. The Government argues that evidence of Gilstrap's involvement in the gambling business was admissible to prove his motive and intent to commit the crimes for which he was charged.

The evidence shows that Gilstrap had conducted gambling operations on at least two prior occasions and that after the termination of his last operation, his gam-

bling equipment had been seized. The jury could reasonably draw the inference from such evidence that Gilstrap intended to continue his illegal gambling activity and to replace the gambling equipment which had been confiscated.

Generally, evidence of prior criminal activity of a similar nature is inadmissible to prove the commission of a later offense. However, there are exceptions to this general rule of exclusion, and where intent and knowledge are essential elements of the crime for which the defendant is being tried, evidence of other transactions, even though criminal in nature, is admissible to prove the necessary criminal intent or guilty knowledge, if the transactions are so connected with the offense charged that they serve to show a general pattern. *Pardo* v. *United States*, 5 Cir., 1966, 369 F. 2d 922. Evidence that similar or related offenses were committed over a period of time tends to show a consistent pattern of conduct highly relevant the issue of intent. *Nye & Nissen* v. *United States*, 336 U. S. 613, 618, 69 S. Ct. 766, 769 (1949).

Although the evidence concerning Gilstrap's gambling operations did not constitute conclusive proof of his guilt, it was nevertheless admissible to show that he had sufficient motive and intent to replace the confiscated equipment in order to continue with his business of gambling. The trial judge was careful to instruct the jury that the evidence of defendants' prior gambling activities did not create an inference that they were conducting similar activities during the time charged in the indictment, and that the evidence was admitted for the limited purpose of indicating a motive on the part of the defendants for undertaking the particular conduct with which they were previously charged.

The evidence must be of similar acts occurring reasonably near in time and reflecting intent similar to that charged in this case. *Whaley* v. *United States,* 9 Cir., 1963, 324 F. 2d 356, cert. denied, 376 U. S. 911, 84 S. Ct. 665 (1964). We find that the incidents testified to by Price were not remote in time to the offenses charged in the indictment. The first gambling operation at Yarborough Estates occurred only one year before Gilstrap was arrested and the operation in the concrete block building was just six months prior to his arrest. It is unrealistic to say that these operations, organized and operated in the span of only one year's time, are remote in time. Therefore, we hold that the court did not err in admitting this testimony by the Government witness, Price.

Appellant also contends that the court should have excluded from evidence the file cards taken under search warrant from the offices of Christy Jones and Company and the file of work sheets and invoices taken under search warrant from the home of Wilbert Sullivan, an agent for Christy Jones and Company, on the ground that they had not been established as authentic records of the company and that they were unconnected to the defendants.

The general rule is that such records are not admissible as evidence under the Official Records Act (28 U.S.C. § 1732) unless a proper foundation is laid, establishing them as records made in the regular course of business. *Bisno* v. *United States,* 9 Cir., 1961, 299 F. 2d 711, cert. denied, 370 U. S. 952, 82 S. Ct. 1602 (1962); rehearing denied, 371 U. S. 855, 83 S. Ct. 51 (1962). The testimony of the witness, Price, established that the records taken from the offices of Christy Jones and Company and from their agent, Sullivan, were authentic and regular business memoranda of the transactions between him and Sullivan, and firmly connects the defendants to these records. They

were merely corroborative of prior oral testimony in the case. We find, therefore, that the proper predicate was laid for the introduction of these records into evidence.

Appellant Martin contends that the record is insufficient to sustain a finding by the jury beyond a reasonable doubt that he knew of the existence of the conspiracy and intended to participate in the unlawful enterprise.

In *Ingram* v. *United States*, 360 U. S. 672, 79 S. Ct. 1314 (1959), in holding that the evidence was insufficient to establish knowledge on the part of the employees of certain numbers operators to sustain a conviction of conspiracy to evade income taxes, the Supreme Court said:

> "It is fundamental that a conviction for conspiracy under 18 U.S.C. § 371, . . . cannot be sustained unless there is 'proof of an agreement to commit an offense against the United States.' Pereira v. United States, 347 U. S. 1, 12, 74 S. Ct. 358, 364, 98 L. Ed. 435. There need not, of course, be proof that the conspirators were aware of the criminality of their objective, but an essential ingredient of the proof was knowledge on the part of Smith and Law that Ingram and Jenkins were liable for federal taxes by reason of the gambling operation. 'Without the knowledge, the intent cannot exist.' Direct Sales Co. v. United States, 319 U. S. 703, 711, 67 S. Ct. 1265, 1269, 87 L. Ed. 1674."

The record, and in particular the testimony of Price, established that Martin was closely involved in Gilstrap's gambling operations and that he was obviously aware of Gilstrap's intention to set up a gambling operation at the Paramount Club in Augusta, Georgia.

Price testified that Martin, whom he had originally met in Las Vegas, worked as a crap dealer for him and Gilstrap at Yarborough Estates and that later both he and Martin had been employed by Gilstrap as crap dealers at his concrete block building gambling operation. The evi-

dence shows that Martin anticipated the commencement of gambling operations at the Paramount Club by renting a house in Augusta, Georgia, for the month of February, although the equipment was not delivered until February 4, 1965. Furthermore, there was a number of telephone calls between Martin and Gilstrap and other members of the conspiracy on and after the date of delivery. Martin was obviously more than a hired hand. He had worked with Gilstrap on at least two other occasions, he knew that Gilstrap had lost all of his equipment in the raid on his last operation, and he had advance notice of the operations at the Paramount Club because he relocated his residence in Augusta, Georgia, four days before they began, and was thereafter employed in the Paramount Club as a crap dealer.

We hold that the jury could have reasonably found that Martin was familiar with the gambling business; that he had prior contacts with both Gilstrap and Price; that he had moved to Augusta in anticipation of the arrival of the gambling equipment and the start of the operation of the Paramount Club; was then employed as a crap dealer; and that he had numerous conversations with Gilstrap in connection therewith; accordingly, that the jury was justified in finding that Martin was a member of the conspiracy.

We have carefully considered all other points raised by appellants and find them to be without merit.

The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. *Moody* v. *United States,* 5 Cir., 1967, 377 F. 2d 175; *Peters* v. *United States,* 5 Cir., 1967, 376 F. 2d 839. The evidence in this case amply supports the jury's verdict.

AFFIRMED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1967

No. 24487
D. C. Docket No. CR No. 24644

LEE MANSELL GILSTRAP and MARCUS RANDOLPH MARTIN,
Appellants,

versus

UNITED STATES OF AMERICA
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

Before MARIS,* THORNBERRY and AINSWORTH,
Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Issued as Mandate: January 31, 1968

*Of the Third Circuit, sitting by designation.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24487

LEE MANSELL GILSTRAP and MARCUS RANDOLPH MARTIN,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

(March 1, 1968)

On Petition for Rehearing

Before MARIS*, THORNBERRY and AINSWORTH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellants' petition for rehearing in this cause be DENIED.

---

*Of the Third Circuit, sitting by designation.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that true copies of the foregoing petition of Lee Mansell Gilstrap and Marcus Randolph Martin were this date deposited in the United States Post Office with air-mail postage prepaid, addressed to the Solicitor General of the United States, Department of Justice, Washington 25, D. C.; Charles Ruff, Esquire, Department of Justice, Washington 25, D. C.; and Charles L. Goodson, United States Attorney, Old Post Office Building, Atlanta, Georgia.

This 27th day of March, 1968.

.....

ROBERT B. THOMPSON

SUPREME COURT, U. S.

No. 1271

FILED

APR 25 1968

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

LEE MANSELL GILSTRAP and MARCUS RANDOLPH MARTIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

FRED M. VINSON, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1271

LEE MANSELL GILSTRAP and MARCUS RANDOLPH MARTIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1968. A petition for rehearing was denied on March 1, 1968. The petition for a writ of certiorari was filed on March 28, 1968. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1952, prohibiting the use of interstate commerce facilities to promote illegal activities, is constitutional.

2. Whether documents reflecting one of the transactions underlying the prosecution were erroneously admitted into evidence.

STATEMENT

In the United States District Court for the Northern District of Georgia, petitioners and others [1] were convicted of conspiring to use the facilities of interstate commerce with intent to promote unlawful (gambling) activities in the State of Georgia, in violation of 18 U.S.C. 1952. Petitioner Gilstrap was also convicted of three substantive violations of that statute. Gilstrap was sentenced to imprisonment for two years, and was fined $7,500.00. Martin was sentenced to imprisonment for one year and one day, with sentence suspended. The court of appeals affirmed (Pet. App. A1-A9).

The government's principal witness was Stephen Price, an unindicted co-conspirator. He testified that, in January 1965, Gilstrap and co-defendant Samuel Coley asked him to order gambling paraphernalia

---

[1] Co-defendant Fred Mullis entered a plea of nolo contendere. Co-defendant Samuel Coley was convicted on all counts in which he was charged and did not appeal.

from Christy and Jones, Inc. ("C. & J."), a Las Vegas gambling supplier (Tr. 31-32). Pursuant to their directions, Price—identifying himself as Coley—telephoned C. & J. and spoke to one Sullivan (Tr. 32-34). Sullivan stated that he would have to check into the order, and asked Price to call back the following evening (Tr. 33). When he telephoned the next day, Price ordered approximately $1900 worth of gambling equipment (Tr. 34-35). After Gilstrap or Coley gave him approximately $1900 in cash, he purchased a Western Union money order and forwarded it in payment for the merchandise ordered (Tr. 43-45). One week later, Price again telephoned Sullivan to ask about the progress of the order. He was told that it was being shipped by the Ringsby trucking firm, a trucking line operating out of St. Louis, Missouri (Tr. 36-37). After various telephone calls were made in an attempt to trace the shipment (Tr. 39-42), Price learned that the equipment had arrived in Atlanta. He so notified Coley (Tr. 42-43). The equipment was picked up from the trucking line by Fred Mullis (identifying himself as Sam Coley) (Tr. 160-163). Coley then rented a building in which he set up a gambling business equipped with gambling merchandise similar to that ordered by Price (Tr. 47-53, 169-174). Price and petitioner Martin were employed at this establishment by Gilstrap (Tr. 48, 51).

Corroborating evidence, including telephone toll records, bills of lading, and other documents, showed that telephone calls charged to Coley had been made to Las Vegas (Tr. 340-341, 397-398; Govt. Exh. 6), and to the shipping lines (Tr. 140-146); that a money

order in the amount of $1900 had been sent to Las Vegas (Tr. 135-140); that merchandise, consigned to Sam Coley from Sullivan, had been shipped to Atlanta (Tr. 7-10, 151-152, 161-164; Govt. Exhs. 1, 3); and that petitioners conducted a gambling enterprise in violation of Georgia law (Tr. 48-52, 418-419).

ARGUMENT

1. Petitioners challenge the constitutionality of 18 U.S.C. 1952 on two grounds: that the statute is unduly vague, and that it exceeds the powers delegated to Congress by the states. Not only is it conceded, however (Pet. 7), that the statute has been consistently sustained against contentions that it is impermissibly vague (*United States* v. *Barrow*, 363 F.2d 62 (C.A. 3), certiorari denied, 385 U.S. 1001; *United States* v. *Zizzo*, 338 F.2d 577 (C.A. 7), certiorari denied, 381 U.S. 915; *Turf Center, Inc.* v. *United States*, 325 F.2d 793 (C.A. 9); *Bass* v. *United States*, 324 F.2d 168 (C.A. 8)), but the courts have also uniformly rejected claims that it was enacted in excess of Congressional authority (*United States* v. *Barrow*, *supra*; *Marshall* v. *United States*, 355 F.2d 999 (C.A. 9), certiorari denied, 385 U.S. 815), that it invades the powers reserved to the States by the Tenth Amendment (*United States* v. *Barrow*, *supra*; *Marshall* v. *United States*, *supra*; *United States* v. *Zizzo*, *supra*), and that it improperly restricts the right to travel (*United States* v. *Zizzo*, *supra*). Contrary to petitioners' speculation (Pet. 8-10), the statute does not "chill" legitimate travel or restrict the activities of every person who once traveled in interstate com-

merce with some untoward intent. The statute plainly concerns itself only—as in this case—with those persons who travel in or use the facilities of interstate commerce with the specific intent to promote one of the crimes defined in that section and who thereafter perform some act in furtherance of the unlawful intent.

2. During the investigation of this case, an F.B.I. Agent, pursuant to a warrant, searched Sullivan's residence in Las Vegas, and the premises of C. & J. At Sullivan's, the agent seized a folder of invoices including one reflecting the sale of gambling equipment here involved (Tr. 200-203; Govt. Exh. 6). At C. & J. he seized a "Rol-o-dex" file which also corroborated the occurrence of the transaction (Tr. 204-205; Govt. Exh. 7).[2] Over petitioners' objection that the records were hearsay, both exhibits were received in evidence (Tr. 206, 420-421).

Although the government did not undertake to qualify the records formally for admission under the Official Records Act (28 U.S.C. 1732), we submit that their introduction into evidence did not constitute prejudicial error. First, the very fact that C. & J. and Sullivan (its employee) had in their possession documents purporting to record the transaction alleged by the government to have taken place was a circumstance which the jury, without violating the hearsay rule, could consider in determining whether the

---

[2] While neither exhibit is before this Court, we have been advised that Exhibit 6 reflected the transaction on a C. & J. invoice sheet, and included the telephone number of that firm.

transaction in fact occurred. See *United States* v. *Sessin*, 84 F.2d 667 (C.A. 10); McCormick on *Evidence*, § 229, pp. 478-479 (1954); American Law Institute, *Model Code of Evidence*, § 501, pp. 224-225 (1942). In any event, as the court below noted (Pet. App. A8), the exhibits "were merely corroborative of prior oral testimony in the case."

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

APRIL 1968.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 297444 726